Supreme Court, U.S.
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NO.

In the

Supreme Court of the United States

October Term, 1997

HATTIE FOSTER DAVIDSON,
Petitioner

v.

WILLIAM J. PERRY, Secretary,
DEPARTMENT OF DEFENSE,
Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Appellate Court so far departed from the accepted and usual course of judicial proceedings and reinforced such a departure by a lower court by failing to consider whether the Appellee violated the Rehabilitation Act when it refused to afford Appellant a reasonable accommodation.

1. Whether the Appellate Court failed to acknowledge that Appellant's disability was clearly known to the Appellee.

2. Whether the Appellate Court erred in concluding that Appellant was not "otherwise qualified" for purposes of her request for accommodation.

3. Whether the Appellate Court erred in failing to recognize that the Appellee had an affirmative legal duty to accommodate Appellant's disability under the Rehabilitation Act.

LIST OF PARTIES

The names of all parties to the proceedings in the Court whose judgment is sought to be reviewed here appears in the caption of the case.

TABLE OF CONTENTS

PAGE(S)

QUESTIONS PRESENTED FOR REVIEW.....1

LIST OF PARTIES.....2

TABLE OF CONTENTS.....3

TABLE OF CITATIONS.....4

OPINIONS BELOW.....7

STATEMENT OF JURISDICTION.....7

APPLICABLE STATUTORY PROVISIONS.....7

STATEMENT OF THE CASE.....7

ARGUMENT.....9

THE APPELLATE COURT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO CONSIDER WHETHER THE APPELLEE VIOLATED THE REHABILITATION ACT WHEN IT REFUSED TO PROVIDE APPELLANT A REASONABLE ACCOMMODATION.....9

A. The Appellate Court Failed to Acknowledge that Appellant's Disability Was Known to Appellee....10

B. The Trial Court Erred In Concluding That Appellant Was Not "Otherwise Qualified" For Purposes Of Her Request for Accommodation....14

C. The Trial Court Erred In Failing To Recognize That Appellee Had An Affirmative Legal Duty To Accommodate Appellant's Disability Under The Act.....18

CONCLUSION.....24

TABLE OF CITATIONS

CASES: PAGE(S)

Bey v. Bolger, 540 F.Supp. 910 (E.D. Pa. 1982).....20

Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985).....9,10

Gilbert v. Frank, 949 F.2d 637 (2d Cir. 1991).....14,15

Hall v. United States Postal Service, 857 F.2d 1073 (6th Cir.1988).....14,18

Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985).....10

Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985).....18,20

Marsh v. Arline, 107 S.Ct. 1123, 94 L.Ed 2d (1987).....20

Pandazides v. Virginia Board of Education, 804 F.Supp. 794 (E.D. Va. 1992).....15,16

Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981).....9,10,19,20

Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).....9,10

School Board of Nassau County v. Arline 480 U.S. 273, at 287 N.17, 107 S.Ct. 1123, 94 L.Ed 2d 307 (1987).....14

Southeastern Community College v. Davis, 442 U.S. 397, 60 L.Ed.2d 980, 99 S.Ct 2361 (1979).....14

Williams v. Casey, 691 F. Supp. 760 (S.D.N.Y. 1988).....10

FEDERAL STATUTES:

28 U.S.C. §2101 7

29 U.S.C. §791.....7

29 U.S.C. §794.....7,9

FEDERAL REGULATIONS:

29 C.F.R. §1613.704(a).....10

MISCELLANEOUS:

S. Rep. 93-1297, 93d Cong., 2d Sess. 32, reprinted in (1974) U.S. Code Cong. And Ad. News 6373, 6400.....18

Accommodating the Handicapped: Rehabilitating Section 504 after Southeastern, 80 Colum. L. Rev. 171, 187-188 (1980).....19

APPENDIX

A. Opinion of the United States District Court for the Eastern District of Virginia.....1a

B. Opinion of the United States District Court for the Fourth Circuit.....15a

C. Order denying Petition for Rehearing with Suggestion for Rehearing In Banc...19a

OPINIONS BELOW

The Opinion of the trial court is not reported. (Appendix 1a). The Opinion of the United States Court of Appeals for the Fourth Circuit is unpublished. (Appendix 1b).

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Fourth Circuit was entered on March 30, 1998. (Appendix 1b).

A timely Petition for Rehearing with Suggestion for Rehearing In Banc was denied on March 30, 1998. (Appendix 1c)

Jurisdiction of this Court is conferred pursuant to 28 U.S.C. §2101.

APPLICABLE STATUTORY PROVISIONS

The Rehabilitation Act of 1973 ("the Act"), 29 U.S.C. §791 and §794.

STATEMENT OF THE CASE

Appellant initiated this action against Appellee by filing a Complaint in the United States District Court for the Eastern District of Pennsylvania on November 20, 1995. On April 4, 1996, the case was transferred to the United States District Court for the Eastern District of Virginia.

In her complaint, Appellant alleged two distinct claims. Firstly, Appellant claimed that Appellee discriminated against her

during her employment, on the basis of her disability, namely asthma, by failing to provide her with a requested reasonable accommodation. The requested accommodation was a transfer to a different military base with a medical facility that could provide her with the appropriate medical care and treatment for her asthmatic condition.

Secondly, Appellant alleged that she was terminated from her employment, as a special education school teacher, solely because of her asthmatic condition. This aspect of her claim is not being challenged herein.

On January 21 and 22, 1997, the case was tried before the Honorable James C. Cacheris, sitting without a jury. On January 22, 1997, Judge Cacher is issued a ruling from the bench in favor of Appellant.

Thereafter, Appellant filed a timely motion for a new trial, which was denied.

On March 7, 1997, Appellant filed a timely appeal to the Fourth Circuit Court of Appeals challenging the trial court's ruling in favor of Appellant. The appellate court denied Appellant's appeal and subsequently its Petition for Rehearing and for Rehearing In Banc on March 30, 1998.

As did the trial court, the Fourth Circuit Court of Appeals failed to address whether the Appellee actions were violative of the Rehabilitation Act solely by virtue of its failure to provide the Appellant with a reasonable accommodation under the law.

ARGUMENT

THE APPELLATE COURT SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BY FAILING TO CONSIDER WHETHER THE APPELLEE VIOLATED THE REHABILITATION ACT WHEN IT REFUSED TO PROVIDE APPELLANT A REASONABLE ACCOMMODATION.

By disregarding federal law and failing to afford appellate review on whether Appellant was unlawfully denied a reasonable accommodation, in the form of a compassionate transfer, the Fourth Circuit Court of Appeals committed reversible error.

Section 501 of the Act provides that "[n]o otherwise qualified handicapped individual...shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal or financial assistance or under any program or activity conducted by an executive agency..." 29 U.S.C. §794.

Section 501 requires more of a federal employer than simply non-discrimination. The Act imposes an affirmative duty on federal agencies, such as Appellee, to accommodate handicapped employees. 29 U.S.C. §791(b). Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989); Gardner v. Morris, 752 F.2d 1271 (8th Cir. 1985); Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). In fact, when considering accommodation requests, "...Congress intended that the federal government be a model employer of the handicapped." Gardner, 752 F.2d at 1280 (8th

Cir. 1985), citing, 29 C.F.R. §1613.703 (1984).(emphasis added).

To demonstrate a violation of Section 501 of the Act, a plaintiff must prove that (1) her handicap was known to the employer (2) that she was "otherwise qualified" for the position she held, and (3) that the employer failed to reasonably accommodate her. Prewitt v. U.S. Postal Service, 662 F. 2d 292 (5th Cir. 1981); Williams v. Casey, 691 F. Supp. 760 (S.D.N.Y. 1988); 29 C.F.R. 1613.704. As an additional element, a plaintiff must also demonstrate that she meets the definition of an individual with a handicap. Jasany v. United States Postal Service, 755 F.2d 1244, 1249 (6th Cir. 1985).

After the employee makes this *prima facie* showing, the employer then bears the ultimate burden of demonstrating an inability to accommodate the employee. Gardner v. Morris, 752 F.2d at 1280 (8th Cir. 1985). The Act imposes an affirmative legal duty upon federal agencies to offer reasonable accommodations. 29 U.S.C. §791; Rodgers v. Lehman, 869 F.2d 253 (4th Cir. 1989).

The Appellate Court was remiss in its application of the above legal standards and burdens of proof. In this respect, the Court committed three significant errors.

A. The Appellate Court Failed to Acknowledge That Appellant's Disability Was Known To Appellee.

As part of her *prima facie* case, Appellant was required to demonstrate that her disability was known to Appellee. The

trial court did not engage in any significant legal analysis regarding this issue and disregarded its importance with respect to Appellant's claim that she was unlawfully denied a reasonable accommodation. The trial court's findings are replete with misapplication and misinterpretation of both the law and the facts on this issue.

The trial court concluded that (1) Appellant only "raised some objection to accepting employment" when she was transferred to the school..." ; (2) that "[n]o mention was made of her asthma condition." ; (4) that Appellant made no special request for a medical accommodation "other than she wanted to be near an area with a larger medical center"; (5) and that "a lot of people" were unaware of the full nature of her handicap. These findings were contrary to the weight of the evidence. (Appendix 1a).

The record is supported by both documentation and oral testimony that Appellee' agents, including Danielle Osgood, the principal, and Nancy Brasell, the superintendent, were aware of Appellant's disability. Regardless of this knowledge, Appellee took no affirmative actions to offer her any accommodation.

Appellant testified that at the start of her employment, she made Appellee aware of her medical condition and special needs. In fact, Appellant accepted the position at the school "under protest" because of concerns related to her asthma. In the memorandum directed to ODS Personnel Division, she protested her transfer because the

"...Schweinfurt community does not have the medical facilities necessary to maintenance of [her] asthma condition... [and] there are no American emergency facilities in the evenings and weekends". Appellant also indicated that "the nearest American facility [was] forty-five (45) minutes away... [and that] This distance could be threatening to [her] in an emergency situation." Appellant also testified at trial that in the event of an asthma attack, she would need to be close enough for her to drive herself to a major medical facility to receive oxygen and other special medical treatment.

In April 1993, because of her medical condition, Appellant made a request to Osgood, the principal, for a compassionate transfer. Osgood signed-off on this transfer request form. Appellant then submitted a detailed letter from her physician, Bret Daniels, M.D., with the request form, delineating the nature and extent of her medical condition and needs for accommodation. The letter stated that Appellant's health was being severely compromised at the School.

Further, according to the EEOC determination, Osgood also admitted that he was aware of the Plaintiff's request for compassionate transfer and medical needs. The EEOC determination states that "The principal [Osgood] testified that he knew [Appellant] had asthma and took medication, having seen her documents requesting a transfer."

Similarly, Brasell, the superintendent of the School, testified at trial that she

was well aware of Appellant's disability and her need for accommodation when Appellant protested her reassignment to the School in September, 1992. Moreover, Brasell knew of Appellant's disability and request for accommodation in the Spring of 1993. In fact, Brasell admittedly testified that "Ms. Davidson...described her special needs and intimated that [Appellee] had not really provided the accommodation required for her medical condition...[and] she had informed [Appellee] that she needed to be in an area close to a major medical facility."

This aspect of Appellant's claim also raises an issue as to when Appellant's medical condition became known to Appellee. Brasell testified that she was aware of Appellant's disability from the outset of her employment and that she made Parsons aware of Appellant's condition when she drafted her summary of response in the Spring of 1993.

Parson's testified however, that Appellant's medical condition was not made known to her until some time in 1994. This is a critical disparity in Appellee' testimony and is at odds with the trial court's conclusions regarding credibility. The trial court found Parson's testimony to be more credible than Appellant's testimony or the testimony of her witness Denenny. This was clearly erroneous in that Appellee' own witness, Brasell, supported Appellant's version of events.

As demonstrated above, by Appellee' own admissions, the findings made by the trial court are contrary to and in disregard for the weight of the evidence.

B. The Trial Court Erred In Concluding That Appellant Was Not "Otherwise Qualified" For Purposes of Her Request For Accommodation.

The Supreme Court has held on numerous occasions that, under the Act, "in the employment context, an otherwise qualified person is one who can perform the essential functions of the job in question." School Board of Nassau County v. Arline, 480 U.S. 273, 287 n.17, 107 S.Ct. 1123, 1131 n.17, 94 L.Ed 2d 307 (1987); Southeastern Community College v. Davis, 442 U.S. 397, 99 S.Ct 2361, 60 L.Ed.2d 980 (1979).

To ascertain whether an employee has met this criteria, the Supreme Court adopted a two-part analysis of the Act's "otherwise qualified" requirement. Gilbert v. Frank, 949 F.2d 637,641 (2d Cir. 1991). First, a court must determine what the essential functions of the job in question. Second, the court must "...evaluate the medical evidence to determine whether the plaintiff can perform the job despite the handicap." Id. at 641.

If the answer to the second part of this analysis is in the negative, a court is bound to inquire, in light of the medical findings, "whether the employer could reasonably accommodate the employee under the established standards for that inquiry." Hall v. United States Postal Service, 857 F.2d 1073, 1078 (6th Cir. 1988).

The plaintiff's burden is not onerous. It would be sufficient for a plaintiff to present evidence as to her "individual capabilities and suggestions for some reasonable assistance or job modification by the employer." Gilbert, at 642.

In the case at bar, the trial court ruled as a matter of law that Appellant was not "otherwise qualified". (Appendix 12a). In this vein, the trial court summarily concluded based on testimony elicited at the time of trial, that Appellant was not satisfactorily performing her job as a special education teacher. Appellant does not refute this fact. The trial court reasoned:

> While there was some improvement from the '92 - '93, into the '93 - '94 year on some of [Appellant's] critical elements, still the one important one which was the Case Study Committee...[Appellant] did not perform well in that area, and she has been unable to show that she was otherwise qualified. (Appendix 12a) (emphasis added).

It is clear that the trial court erred with regard to the application of the above legal standard by failing to engage in any meaningful legal analysis with regard to whether Appellant was "otherwise qualified" under the Act.

First, the trial court failed to assess the "essential functions" of Appellant's job. In this respect, the trial court should have adopted the standards previously set forth by that court in the case of Pandazides v.

Virginia Board of Education, 804 F.Supp. 794 (E.D. Va. 1992).

In Pandazides, an employee brought an action alleging that the Virginia Board of Education discriminated against her on the basis of her disability in connection with the requirements necessary to pass a national teacher examination. The court properly ascertained the "essential functions" of the plaintiff's job, who was like Appellant, a school teacher.

For purposes of determining whether the handicapped employee in Pandazides was "otherwise qualified", the court looked to elements such as the employee's "...ability to read intelligently, to comprehend written and spoken communications accurately, effectively and quickly, and to respond to written and spoken communications professionally, effectively and quickly." Id. at 803. (emphasis added). The court also reasoned that "...the ability to manage a classroom is [also] an essential function for a public school teacher in grades 1 through 12 in Virginia." Id. at 803. These factors, the court ruled, are "essential functions" of a special education, public school teacher in Virginia.

In the instant matter, the trial court failed to consider any of the evidence of the "essential functions" of Appellant's job. First and foremost to this analysis should have been the performance appraisal issued to Appellant prior to her discharge. These are the functions Appellant was required to perform to do her job. It is undisputed, by Appellee's own admission, that Appellant

satisfactorily: (1) prepared and maintained written goals for the program; (2) planned for daily instruction using Appellee's curriculum guides; (3) prepared and had available upon request written daily lesson plans that incorporated the goals of Appellee; (4) incorporated instructional strategies to include the use of instructional plans and teacher demonstrations; (5) presented lessons in a clear manner while stating objectives to the learners; (6) consulted with administrators, teachers and parents; and (7) organized her classrooms and promoted learning. These are the aspects of Appellant's job the trial Court should have considered in assessing the "essential functions".

The satisfactory performance of these functions, as admitted by Appellee, conclusively demonstrates that Appellant was "otherwise qualified." Whether an employee has the ability to engage in written and spoken communication intelligently, accurately, and effectively, are precisely the sorts of elements the court in Pandazides recognized as critical to the analysis of whether an employee is "otherwise qualified" under the Act. As such, Appellant sufficiently demonstrated that she was "otherwise qualified" to perform the essential functions of her job.

The trial court's finding that Appellant was performing her job unsatisfactorily does not mandate that she is not "otherwise qualified" under the Act. If this were the law, an employer would never be obligated to afford a poorly performing employee accommodation under the Act,

regardless of whether that poor performance was a result of not being accommodated.

C. The Trial Court Erred In Failing To Recognize That Appellee Had An Affirmative Legal Duty to Accommodate Appellant's Disability Under the Act.

With regard to the second part of the inquiry, after finding Appellant to be "otherwise qualified" the Court should have ascertained whether in light of the medical findings, Appellee could have reasonably accommodated her. Hall, 857 F.2d 1073, 1078 (6th Cir. 1988). As is demonstrated below, the Court failed to recognize that Appellee did not meet their burden on this point as well.

In establishing the legal standards pertaining to accommodation requests, Congress chose to use the term "affirmative action" when discussing a federal employer's duty to make reasonable accommodations to its employees. Congress was clearly implying that a more active and extensive effort be made than simply non-discrimination on the part of the employer. Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985), citing, S. Rep. 93-1297, 93d Cong., 2d Sess. 32, reprinted in (1974) U.S. Code Cong. and Ad. News 6373, 6400.

Under the Act, the employer is under an affirmative duty to gather sufficient information from the employee and qualified experts, as needed, to determine what accommodations are necessary to enable an employee to perform his job function. Id. at 1423. Moreover, a good faith or rational

belief on behalf of the employer, that accommodation is infeasible, is not a sufficient defense to such a claim. Id. at 1423.

The Act requires that the federal employer bear the burden of demonstrating that it is unable to accommodate the employee's request. As the Fifth Circuit Court of Appeals has recognized:

> The burden of proving inability to accommodate is on the employer. The administrative reason for so placing the burden likewise justify a similar burden of proof in a private action based on the Rehabilitation Act. The employer has greater knowledge of the essentials of the job than does the handicapped [employee] .... Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources. (emphasis added).

Prewitt v. United States Postal Service, 662 F.2d 292 (5th Cir. 1981), citing, Note, Accommodating the Handicapped: rehabilitating Section 504 after Southeastern, 80 Colum. L. Rev. 171, 187-188 (1980).

However, if the employer is able to present credible evidence that the accommodation is not possible or would be unduly burdensome, the analysis does not end. The employee is permitted an opportunity to produce evidence "concerning his individual capabilities and [other] suggestions for possible accommodations to rebut the employer's evidence." (emphasis added).

Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981); Bey v. Bolger, 540 F.Supp. 910, 924-25 (E.D. Pa. 1982); 29 C.F.R. Sec. 1613.704(a).

Other reasonable accommodation requests may include, but are not limited to, job restructuring, modification of work schedules, and even granting transfer requests. Mantolete, 767 F.2d 1416, 1423 (9th Cir. 1985)(emphasis added). On the issue of whether a job transfer is a "reasonable accommodation", the Supreme Court has held:

> "Employers have an affirmative obligation to make a reasonable accommodation for a handicapped employee...they cannot deny an employee alternative employment opportunities reasonably available under the employer's existing policies."

Marsh v. Arline, 107 S.Ct. 1123, 1131 N.19, 94 L.Ed 2d (1987).

The trial court failed to analyze Appellee' legal burdens under the Act, and summarily concluded that Appellee had "nowhere" to transfer Appellant. Accordingly, the trial court ruled that Appellee met its burden of proof. (Appendix, 13a). However, a closer examination of the facts reveals that Appellee failed to meet its burden in every respect.

Appellee did not have any established procedure in place to facilitate Appellant's accommodation requests. Appellant's requests

for accommodation were ignored by her supervisors, the principal of the school, ad the compassionate transfer review board. Brasell and Osgood testified that they were only "middlemen" in the process and never adequately saw to it that Appellant's application's were forwarded through the proper channels. Moreover, Brasell and Osgood attempted to ascertain the status of Appellant's requests, they were unable to do so because they maintained no records of the transfer applications. Brasell never investigated the medical information submitted by Appellant and failed to address the issue of whether a transfer or any other reasonable accommodation could have been afforded to Appellant.

Further, Appellee never advised Appellant why she was not being transferred. In fact, when any employee requests such a medical accommodation transfer, Brasell admittedly testified that "you don't learn that your application is denied. You just don't get anything." It is even more incredulous that one of the articulated reasons for Appellee' failure to follow-up on Appellant's request for accommodation was due to the fact that she was in the middle of her "Performance Improvement Period." This reason was asserted for the first time at trial.

These facts demonstrate that in actuality, Appellee penalized Appellant by denying her request for a transfer under the Act. This was clearly illegal.

At trial, Edward Turner, Chief of the Staffing branch for Appellee, testified

regarding the procedures for requesting compassionate transfers as accommodations. Mr. Turner professed to be experienced in handling the type of transfer Appellant sought. However, the evidence demonstrates that Turner was not an expert.

Turner testified that he received Appellant's request for compassionate transfer in April of 1993, but made a decision to deny the request based on a determination that Appellant's asthma was "under control". Despite Turner's assertion, the evidence shows that Turner failed to understand that nature of Appellant's disability. His decision to deny Appellant the transfer was based on one sentence of the Doctor's report which indicated that Appellant's asthma was presently "well controlled". In fact, Turner disregarded every other statement made by the physician that the location where Appellant worked could be "life-threatening" and that Appellant was not receiving the proper medical treatments for her condition.

As a matter of fact, Turner knew nothing about the disease of asthma when Appellant's request for an accommodation was begin considered. Turner knew nothing about the dangers associated with having an asthmatic attack. Turner knew nothing about Appellant's difficulties in getting adequate medical care when she experienced such an attack. It is astounding that no doctor was on the board to medically assess the validity of Appellant's requests.

As a final point, Turner testified that the second request for accommodation, made in

May 1994, was never forwarded through the proper channels because Appellant submitted that request on the improper form. Even though virtually every key management level employee of Appellee knew of Appellant's condition and requests for compassionate transfer, no one bothered to notify her of this procedural error.

The trial court also disregarded important testimony demonstrating the animus exhibited towards Appellant by Parsons when she requested these accommodations. Brasell testified that during her employment, Appellant complained that she perceived Parsons was "out to get her" when she requested an accommodation. Brasell concurred in and validated this perception in her written summary. Brasell testified at trial that she knew of this and told Parsons that Appellant had this "perception".

Rebecca Denenny also testified that she perceived Parsons actions towards Appellant to be "very cold, very negative, [and] stressful." Denenny testified that she witnessed Parsons deny Appellant time to get certain medications and exhibiting a "low tolerance" for Appellant's needs.

By enacting the Act, Congress specifically sought to preclude the very actions which Appellee took with regard to Appellant's accommodation request. Appellee never investigated or assessed Appellant's medical needs, never offered her other accommodation suggestions and never adequately explained to her why her requests were being denied. In fact, Appellee made

Appellant's situation more onerous by Parson's antagonism and harassment.

As such, Appellee failed to meet its affirmative duties and acted in total disregard of the Act's mandates. The trial court failed to apply the proper analysis and burden of proof. Accordingly, the court's findings should be reversed.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A

E X C E R P T
IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

HATTIE FOSTER DAVIDSON,	)	**C.A. NO.**
Plaintiff,	)	**96-637-A**
	)	
vs.	)	
	)	
WILLIAM J. PERRY,	)	
Secretary,	)	
DEPARTMENT OF DEFENSE,	)	
Defendant,	)	

The above-entitled matter came on to be heard in the United States District Court, Alexandria, Virginia, commencing at 10 a.m. on January 22, 1997.

BEFORE: The Honorable James C. Cacheris, Presiding Chief Judge, United States District Court

APPEARANCES:

For the Plaintiff: Claude D. Conviser, Esq.
Sidney L. Gold, Esq.

For the Defendant: James E. Macklin, SAUSA

Appendix A

THE COURT: I'm going to go ahead and decide this case now because I think it's primarily a question of fact, and there really isn't a lot of law to be put forth in this case. It's an important case, like all cases that are tried here, but certainly it's important because it involves Ms. Davidson's employment, whether she gets reinstated or not, and damages, and obviously important to the Department of Defense School System because of the number of teachers that they have and with the problems that they have in educating children.

In any event, I'm going to go ahead and decide it. I will reserve the right in the event of an appeal to file a written opinion. But I'm doing this now because plaintiff is from Philadelphia, many of the Defendants' witnesses are from overseas, and it's not going to get any better if I take it back. It will be a more disciplined opinion. But I'll go ahead, if you bear with me while I go through the evidence here and make my findings of fact and conclusions of law.

The plaintiff in this case is Hattie Foster Davidson, who's date of birth is September 23, 1933, presently resides in West Chester, Pennsylvania. She graduated in 1972 with a BA, Elementary Education and Special Ed; and then in 1976 at Antioch, a Masters in Education, Special Ed; and then she became certified in Special Ed. She had prior employment, '73 to '78 with the Delaware County Intermediate School in

Appendix A

Special Ed, first through third grades, taught multiple handicapped children.

From 1978 through 1983, she's with the Department of Defense overseas in Heidelberg, and actually 78 to '83 Department of Defense overseas in Heidelberg, Germany development of preschool. 1983 to 1984, she was in Misawa Japan; then 1984 to 1985 in Nurenberg, Germany or actually the Schweinfurt School, Nurenburg Germany. The in 1985 she was in Frankfurt Germany. In 1992 she was with the Schweinfurt Elementary School which is the beginning of this case really for terms of any problems that arise. She has three children. Her son was with her overseas who I assume is the 17 year old that she testified to earlier.

The defendant in the case is William J. Perry who is the Secretary of Defense who is being sued, obviously in his capacity as Secretary of Defense and the Department of Defense Office of Dependent Education which is the defendant in the case.

What the evidence shows is that in 1992, after being out of work for about a year or two, and she had problems in her previous employment with the defendant in that there was some financial problem, and then she got a job with the defendant in this case, and she accepted that position, but she also indicated she wanted to be near a medical facility when she accepted it.

Appendix A

What's usual here is that she raised some objection to accepting the employment at that time. However, the union representative indicated this was a wonderful place for her and thought it would work well. No mention was made of her asthma condition.

I find for the record that for approximately 30 years Ms. Davidson has suffered from asthma. She also has hypothyroidism. The main problem that we're dealing with in this case is the asthma which she says caused problems that she experienced at the school while she was working there.

She started her work in 1992, 1993. She apparently had a few students in working, and her immediate supervisor was Ms. Parsons who was the assistant principal. Mr. Osgood was the principal of the school and the second-level supervisor. That continued until approximately January of '94 when the problems became such that part of the settlement discussions were that Mr. Osgood then became her immediate supervisor.

On April 2, 1993, she submitted a transfer application, requesting that she be transferred for compassionate reasons. That was sent through channels and was signed off on. Then Dr. Bret Daniels' letter indicates that she has a well controlled asthma situation. The document speaks for itself; it's in the record. And then he quotes as to some of

the problems she says she is having as a result of it, but he also indicates she had never been hospitalized for the past ten years in this case.

And they indicated there was some delay in receiving her immunotherapy and vitamin B-12 injections. The evidence also shows that one time there was a shipment that was due her that apparently got lost that was slow in getting to her which the plaintiff, Ms. Davidson, experienced some problems.

In any event, the transfer of April 2, 1993 was basically denied. I will also note that during this period of time, '92-'93, '93-'94, and even prior to that, and obviously subsequent to that based on Mr. Turner's testimony, there were cutbacks in the school system and, as a result, 750 to 1,000 positions each year were not filled because of the cutbacks that the schools were experiencing, and I will use the term downsizing. But, in any event, that's what happened. So there really wasn't another place to really send her.

Dr. Bresell could transfer her within the school district she was in charge of, but it had to go someplace else. For a transfer to take place, it would have to be made elsewhere for her to transfer outside of that particular school district, and apparently there wasn't any position open to her.

The medical facility that she wanted

to use was down the road, and the testimony here is, and I will accept Ms. Denenny testimony it's 40 kilometers, I think that's about 24, 25 miles, it was down the road, approximately a half hour driving time on the autobahn, and that has no speed limit on it, this was the hospital.

She started to experience problems, and then she started to receive unacceptable performance in her January midyear review, subsequent counseling she was notified o unacceptable performance. I will say that there were seven critical elements they had to perform in. Particularly the problem that gives rise to this case was the way she did in the Case Study Committee, the CSC.

I'm satisfied that the evidence shows from the testimony that has been put on by the witnesses that are here, particularly Ms. Bunkerr, Ms. Haas, and also Ms. Parsons and Mr. Osgood, that the plaintiff in this case was basically unprepared at the time that the Case Study Committee was meeting. She was not organized. Some of the test scores were wrong. And while mistakes are made, these were apparently her continuing problem that she had, and obviously this was a poor thing to set objectives for the students. In one case I think she had like 33 objectives for a student which was far too many to be realistic.

She didn't do the forms that were necessary in the narrative function as was required by the school district and as

required under policy, so it was a problem. As a result, there were complaints by other co-workers or other teachers, some of the special teachers that were in there, as well as the parents were complaining about the fact of how their students were being treated. Then they had to go back in some cases and have the parents sign another rights form so they could go ahead and proceed to handle that particular case.

On June 11, 1993, there based on the substandard performance, the school proposed a removal. Then on September 13, '93, the plaintiff and her attorney, Mr. Bauernfeind, representative, provided an oral response. And there's no claim that the critical element was a result of her disability, although it was brought to her attention that she did have asthma and did have a problem with it and didn't indicate that the lack of accommodation was a reason for her poor performance. Really the problem in this case is a nexus between the asthma and her poor performance, and I don't think that's what the plaintiff has shown in this case. Her evidence fails to show that.

Let me just note for the record also, Defendants' Exhibit Number 8, May 1, '93 to May 30, '94, DODDS performance appraisal indicates that she was satisfying some of the critical elements, and, again, she was having trouble with the Case Study Committee. She had basically improved in '93-'94, but still the main problem was the Critical Case Study for the students, and

she was apprised of that.

But in any event there was a settlement reached in January of '94 with her attorney, and the settlement at that time was a negotiated settlement, Defendants' Exhibit 22, indicated what would happen. And it was for a a 45-day term. In exchange, she agreed to withdraw her EEO complaints, and then they agreed they would

issue a performance improvement letterr, what have you, it as for a period of 45 days and that Mr. Osgood, they switched supervisor now, Mr. Osgood who was the principal then became the supervisor for the plaintiff at that time. And so he was the person that was responsible to supervise her during her work.

And there were memos that were written to the plaintiff telling Ms. Davidson where her problems were and to try to get them improved. I have think what's also significant in this case is Ms. Haas during her testimony had written the plaintiff at the end of '92-'93 school year indicating what her problems her and some suggested things for improvement and things for her to do over the summer in order to improve her performance.

Nonetheless, in '93-'94 her performance still continued poorly, and especially while it improved in some areas, the Plaintiff wasn't doing as well in the Case Study Committee because she failed to

maintain long-term goals. Again, as the testimony shows in this case, there was problems with with realistic objectives that the student were to make. As indicated by Ms. Bunker as well, some of the EIP for the students had wrong objectives or had too many, and Ms. Bunker indicated there was 33 objectives which were too many in one case. Ms. Bunker offered her help, and they shared an open classroom.

This case also had Mr. Avera, John Avera, who does the testing, and he indicated that the plaintiff had a lot of errors in her raw scores, and obviously the raw scores input on everything that takes place.

What is interesting in this case that the plaintiff indicated, and certainly not everybody knew she had asthma, although some were aware that she had it, but she never made the nexus or never put the bridge across that the poor performance was due to asthma. There's no specific request for a medical accommodation to do that other than she wanted to be near an area with a larger medical center.

In '92, as indicated by Ms. Haas, she had problems with not being familiar with the test, hadn't written the IEP, being aware of meetings, asked for help from Avera, and Ms. Haas tried to help her, also would counsel her, and Ms. Davidson wouldn't take notes, had to go over the same thing again.

Appendix A

Then on the Defendants' Exhibit 30, which was the memo that Ms. Haas gave her which is the outline for improvement over the Summer of 93. And still on '93-'94, Ms. Davidson's students were not making progress, and tests were not done properly. The IEP was by computer, and interestingly, Haas was aware of the hypothyroidism because she suffers from it but was unaware of the asthma. So there was still no real improvement.

Let me also note that in May of '94, she put a second request for transfer in, and apparently that was on the wrong form and unfortunately that was not forwarded or acted upon.

But, in any event, Mr. Osgood, when he took over, he became the principal in March of '93 and replaced Ms. Parsons. He was aware of her performance problems, he tried to monitor and assist her. In the Spring of '93, there was a performance appraisal, gave her 30 days' improvement, and she was reported as being one of the teachers that was still having a problem to Dr. Brasell, and then the decision was made to go ahead and terminate her.

As to whether these people were out to get her, such as Ms. Parsons, Ms. Bunker, I don't find any evidence of that. I don't find the plaintiff's testimony to be credible on that issue that these people had something in for her and they were trying to get her. If anything, I think the evidence shows that efforts were made

on the part of the school system by offering her help, the original 30-day performance improvement, then there a was 45 day one, and the effort was to try to get Ms. Davidson to improve.

During this time, it should be noted that she had some problems which are financial, and that was one of the problems from her previous employment which was settled by an arbitrator. She had unsettled living conditions, and these things were a problems for her, and she never really got really settled into the job.

Her forms were incomplete. Referrals had to be sent back. Dates weren't completed. She apparently had some trouble with the Woodcock Johnson test and the Brigance test, they were not signed properly. And the question here obviously is, is she a handicapped person within the meaning of the Act and was otherwise qualified. Let me get to the Law element of it.

We're dealing with the Rehabilitation Act which is 29 U.S. Code Section 794 and Section 504 which states as follows: "No otherwise qualified individual with handicap shall solely by reason of his or her handicap be excluded from the participation in, be denied the benefits of, or subjected to discrimination under any program or activity receiving federal financial assistance." This obviously is an Act that applies to the plaintiff, and

both sides agree to it.

Defendant concedes that she has a medical problem but denies it is a handicap. The case cited by the plaintiff in this case indicates that obviously anything that affects breathing affects major life activity, and asthma can be a handicap.

What plaintiff must show is, (1) that she's a qualified person with a disability as that term is defined in the Rehabilitation Act of 1973; (2) she must demonstrate she is otherwise qualified for the position at issue, and she was excluded or discharged from the position solely because of that handicap.

Well, I think she has shown that she has, and I would conclude as a matter of law, that she has a handicap which is the asthma, and I will parenthetically note, interestingly, a lot of people that have testified here were unaware of the full nature of her handicap. She never really had a problem from '92 through '94 except in the situation which involved her son which was a traumatic episode that her son experienced when he apparently had cut his feet on some glass. Then Ms. Parsons took her to the hospital.

I will also add there's no showing in this evidence why they terminated the plaintiff in this case. The reasons they terminated her was that she wasn't performing well. While there was some

improvement from the '92-'93, into the '93-'94 year on some of her critical elements, still the one important one which was the Case Study Committee in which the school people met at least twice a week on a Monday and Wednesday in order to discuss the students that they had, she did not perform well in that area, and she has been unable to show that she was otherwise qualified.

I think that the defendants' proffered reasons for terminating her are not pretextural. They are based on the evidence that was presented to them at that time. And I think that the plaintiff in this case has failed to demonstrate, as I indicated to you, the limits. Accordingly, I would find for the defendants in case based on the evidence because I find their witnesses to be more credible than the plaintiff in this case.

Interesting, there isn't any more medical testimony, other than Dr. Daniels' testimony in here, other than that the plaintiff has proffered. Let me also just say, and I wouldn't put this in a written opinion, but I think there has to be a special place in heaven for people that are Special Ed teachers. And I certainly think Ms. Davidson made the effort here, but, unfortunately, she fell down on the Case Study Committee. It is a difficult job, and people that do those type of jobs obviously have to have a great deal of compassion and also a great deal of patience in order to work with students

that have these problems. It is an important function that teachers undertake in order to teach students with these problems, and it take a special person to be able to do, and I think more is demanded of a Special Education teacher than of a regular teacher.

But, in any event, the procedures that were used by the defendant in this case to try to get the plaintiff to improve I think were sincere efforts to try to make her improve and they were not a pretextural reason to go ahead and terminate her. So accordingly, for those reasons I will find in favor of the defendant.

I will go ahead and enter an order.

Recess then until 9 o'clock tomorrow morning.

(At 3:07 p.m., the hearing in the above-entitled matter was concluded.)

Appendix B

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HATTIE FOSTER DAVIDSON, Plaintiff-Appellant	) NO. 97-1312
V.	)
WILLIAM J. PERRY, Secretary, DEPARTMENT OF DEFENSE (Office of Dependents Education), Defendant-Appellee	)

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, District Judge
(CA-96-637-A)

Submitted: December 9, 1997

Decided: January 14, 1998

Before HAL, WILKINS, and NIEMEYER, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

Sidney L. Gold, LOVITZ & GOLD, P.C., Philadelphia, Pennsylvania; Drewery B. Hutcheson, Jr., Alexandria, Virginia, for Appellant. Helen F. Fahey, United States Attorney, Jeri Kaylene Somers, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Appendix B

OPINION

PER CURIAM:

Hattie Foster Davidson appeals from the district court's order, following a bench trial, finding in favor of the Defendant on Davidson's complaint filed pursuant to the Rehabilitation Act of 1973, 29 U.S.C.A. §§701-797b (West 1985 & Supp. 1997), and its order denying her motion for a new trial. She asserts that the district court erred by finding that she did not prove by a preponderance of the evidence that she was illegally discriminated against because of her disability. Finding no error, we affirm.

Davidson, who has asthma, worked as a special education teacher in the Department of Defense school system in Germany from 1978 until she was terminated in 1994. Beginning in the fall of 1992, other teachers and parents advised school officials that they had concerns about Davidson's performance. Despite counseling sessions and assistance from teachers and administrators, Davidson's performance failed to improve, and she received an unsatisfactory performance appraisal. Davidson continued to receive counseling and assistance during the summer of 1993 and 1993-94 school year. However, she still failed to meet the standards in two critical performance areas. Davidson and school officials reached an agreement in January 1994 in which Davidson was given a new first-line supervisor and placed on a

probationary status for forty-five days. Officials eventually extended the

probationary period for another thirty days, but Davidson still failed to perform in a satisfactory manner. According to the terms of the agreement, Davidson was terminated in the summer of 1994. At no point did Davidson attribute her poor performance to asthma.

To establish a prima facie case of discrimination, Davidson must prove: (1) that she has a disability; (2) that she was otherwise qualified for the position; and (3) that the Defendant discharged her solely because of the disability. *See Shafer v. Preston Mem'l Hosp. Corp.*, 107 F.3d 274, 276 (4th Cir. 1997). The district court found that Davidson was disabled due to her asthma, but it found that she failed to prove by a preponderance of the evidence that she was otherwise qualified for the position or that her disability was the sole reason for her discharge. We find that the district court's decision is supported by the record and not clearly erroneous.

An "otherwise qualified individual" is defined as someone with a disability who can perform the essential functions of the job with or without reasonable accommodation. *See* 29 C.F.R. §1614.203(a)(6)(1997). The overwhelming evidence at trial showed that Davidson could not satisfy this element. Despite

numerous counseling sessions and extensive assistance from other teachers and school officials, she was unable to meet the objective standards in one critical performance area. Parents also registered complaints concerning the quality of education their children were receiving. As a result, the record supports the court's finding that Davidson was not "otherwise qualified" for the position.

The weight of the evidence also supports the finding that Defendant did not discharge Davidson solely because of her disability. Since the record shows that Davidson did not inform school officials that her poor performance was related to her asthma, the district court properly found that Davidson was discharged due to poor job performance and not her disability. In fact, several witnesses testified that they did not know Davidson even suffered from asthma.

We therefore affirm the district court's order. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
March 30, 1998

No. 97-1312
CA-96-637-A

HATTIE FOSTER DAVIDSON

Plaintiff - Appellant

v.

WILLIAM J. PERRY, Secretary, Department of Defense (Office of Dependants Education)

Defendant - Appellee

On Petition for Rehearing with Suggestion Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK